

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LUNA GAMING – SAN DIEGO LLC,  
  
Plaintiff,  
  
vs.  
  
DORSEY & WHITNEY, LLP., HOLLAND  
& KNIGHT LLP, ET. AL.,  
  
Defendant.

CASE NO. 06CV2804 BTM (WMC)  
  
ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS FOR  
SUMMARY JUDGMENT

In this action, Plaintiff Luna Gaming<sup>1</sup> has filed suit against various law firms and attorneys including Dorsey & Whitney (“Dorsey”), Holland & Knight (“Holland”), and Philip Baker-Shenk (“Baker-Shenk”)<sup>2</sup>, alleging causes of action for professional negligence, negligent misrepresentation and breach of fiduciary duty. Defendants Dorsey and Holland move for summary judgment on these claims arguing, *inter alia*, that it did not in fact represent Plaintiff and did not have an attorney-client relationship with Plaintiff.

**FACTUAL BACKGROUND**

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<sup>1</sup> Luna Gaming was originally named Action Gaming. Thomas Celani, the owner of Action Gaming changed the entity’s name to Luna Gaming on June 29, 2001. Throughout this motion, this gaming entity will be referred to as Luna Gaming. (DUF 4)

<sup>2</sup> The Defendants named in this suit also include (1) James Townsend, a Dorsey attorney; (2) Philip Baker-Shenk, a former Dorsey attorney who joined the Holland firm; (3) Bradley Grant Bledsoe Downes, a former Dorsey attorney who joined the law firm of Bledsoe Downes & Rosier; and (4) Bledsoe Downes & Rosier.

1 A. Overview

2 Thomas Celani ("Celani") is a sophisticated business man who owns several other  
 3 gaming entities aside from Luna Gaming. (Celani Decl. ¶¶ 2-3; Oegema Decl. ¶¶ 35-52) On  
 4 March 27, 2000, Celani formed Plaintiff Luna Gaming for the purpose of entering into a  
 5 gaming venture with the Ewiiapaayp Tribe (the "Tribe"). (DUF 3) On March 29, 2000,  
 6 Plaintiff and the Tribe entered into an agreement to cooperatively build a casino on Tribe-  
 7 owned land in the San Diego area (the "Project"). (DUF 11) The Tribe was represented by  
 8 Defendant Dorsey & Whitney ("Dorsey") prior to and throughout the course of the Project.  
 9 (DUMF1) To complicate matters, Dorsey had also previously represented various Indian  
 10 gaming projects owned by Celani such as Sodak Gaming and the Manistee project starting  
 11 in 1995. (Celani Decl. ¶¶ 2-3)

12 Several years later, after Plaintiff and the Tribe failed to build the casino according to  
 13 the Project plans, Plaintiff brought the instant suit against Dorsey as well as other law firms  
 14 and attorneys complaining of professional inadequacies and misrepresentations made in the  
 15 course of the attorneys' representation. Plaintiff alleges that Dorsey had a joint  
 16 representation relationship with both Luna Gaming and the Tribe while Dorsey denies that  
 17 any such attorney-client relationship existed and contends that Dorsey only represented the  
 18 Tribe with respect to the Project. Whether this attorney-client relationship between Plaintiff  
 19 and Dorsey existed forms the crux of the instant motion for summary judgment.

20

21 B. Events Prior to the Formation of the Project

22 James Townsend ("Townsend"), a partner at Dorsey, has represented the  
 23 Ewiiapaayp Band of Kumeyaay Indians (the "Tribe") since 1997. (DUF 1) Before Plaintiff  
 24 entered the picture in late 1999, Townsend represented the Tribe in its attempt to contract  
 25 to build a casino with other business entities.

26 Plaintiff alleges that Celani had communicated to Dorsey his interest in Indian gaming  
 27 opportunities in California in late 1999 and that Dorsey had provided him a memo on the  
 28 legal status of Indian gaming in California. (PUF 170-172) Plaintiff concedes however that

1 Townsend had not been engaged by or requested by Celani to investigate Native American  
2 gaming opportunities for Plaintiff or Celani. (PNOL, Ex. 1 Celani Depo.128-129) Celani  
3 testified that, in January of 2000, Townsend called him to “sell him” on the gaming  
4 opportunity offered by the Tribe. (PNOL, Ex. 1 Celani Depo. 156-160) According to Plaintiff,  
5 Townsend made several representations regarding the ease and speed with which this  
6 proposed Project could be consummated. (Id.)

7 It is undisputed that Celani knew from the outset of his communications with  
8 Townsend that Townsend (and therefore, Dorsey) represented the Tribe with regard to this  
9 gaming opportunity. (PNOL, Ex. 1 Celani Depo. 161) Plaintiff also concedes that Townsend  
10 did not state that he or Dorsey would represent Celani or any Celani-formed entity with  
11 regard to the gaming opportunity offered by the Tribe. (Id.) Plaintiff only alleges that  
12 Townsend at no point explained that Dorsey could not represent Celani in this venture or  
13 explain any conflicts of interest that would exist with such a joint representation. (Id.)

14 Don Buch, a consultant working for Celani, apparently also had contact with James  
15 Townsend in January of 2000 regarding the possible venture with the Tribe. In two memos  
16 dated January 11, 2000 addressed to Celani, Buch set forth details regarding the possibility  
17 of a deal with the Tribe. (DNOL Ex. V) In one of these memos, Buch noted the fact that  
18 Dorsey represented the Tribe and therefore could not represent Celani on this deal by stating  
19 “we obviously can’t use Dorsey as counsel – any other ideas?” (DNOL Ex. V, p. 488)

20 Celani flew to California to meet with the Tribe in January of 2000. (PUF 183) Both  
21 Celani and a competing investor, First Nation Gaming, submitted proposals to the Tribe and  
22 the Tribe initially chose First Nation Gaming. (PUF 185) In March 2000, Townsend contacted  
23 Celani again to tell him that First Nation Gaming had backed out of the Project. (PUF 186)  
24 Townsend allegedly told Celani during this conversation that the Tribe wanted a deal  
25 immediately and made further representations about the time in which such a venture could  
26 be completed. (PUF 187) In March 2000, Celani entered into a letter of intent to enter into  
27 the Project with the Tribe. (DNOL Ex. BB)

28

1 C. Project Formation and Delay Caused By Opposition to the Project

2 On March 27, 2000, Celani formed Luna Gaming, the entity that would enter into the  
3 Project with the Tribe, with the legal assistance of the law firm of Dykema Gosset. (UF 3)  
4 Celani also retained the law firm of Dykema Gossett to represent Luna during the negotiation,  
5 preparation and execution of the agreements between the Tribe and Luna Gaming regarding  
6 the Project ("Project Agreements"). (UF 26) Shortly after the Project Agreements were  
7 signed, Jim Oegema, an associate at Dykema, became general counsel for Luna Gaming.  
8 (PUF 197)

9 The Project Agreement, which was signed on March 29, 2000, documented the plan  
10 to develop a gaming facility on land that was owned by the Tribe but leased to the Southern  
11 Indian Health Council. (DNOL Ex. B &C) At this point, the Tribe had already obtained an  
12 agreement from SIHC to relinquish the lease in exchange for building a new health facility  
13 elsewhere. (DNOL Ex. A) The Project Agreements provided for a Business Board, a joint  
14 decision-making entity comprised of representatives from Plaintiff and the Tribe, to make  
15 decisions on the development process and to approve Project costs such as attorneys' fees.  
16 (DNOL Ex. B &C) The Project Agreements also specified that Plaintiff would pay the Tribe's  
17 attorneys fees for the work performed on the Project. (Id.)

18 Starting in April 2000, shortly after the parties entered into the Project Agreements,  
19 the neighboring Viejas tribe began to oppose the Project by levying legal challenges to the  
20 Project plans. (DUF 64) The Viejas tribe succeeded in stalling the Project for over three  
21 years. In September of 2003, Plaintiff abandoned its original plan of building a casino on the  
22 land leased by the SIHC and began pursuing a joint venture between the Viejas and  
23 Ewilaapaayp Tribe. (DUF 65) The joint venture plan failed due to a change in Viejas tribal  
24 leadership and inability to pass the needed Congressional legislation. (DNOL Ex. GG,  
25 Oegema Depo. 298.) Plaintiff has since ceased funding the Project and discontinued its  
26 relationship with the Tribe.

27  
28 D. Dorsey's Interactions With Plaintiff For the Duration of the Project

1 Townsend was the lead billing attorney on this Project until 2001 when he retired.  
2 Philip Baker-Shenk ("Baker-Shenk") began working on the Project in late 2000 or early 2001  
3 to assist with the process of obtaining regulatory approval and lobbying government officials.  
4 (HUF 23)

5 It is undisputed that Plaintiff and Dorsey never executed a retention or engagement  
6 letter memorializing an agreement that Dorsey (or any Dorsey attorney) would represent  
7 Plaintiff. (DUF 22) Also, formal documentation submitted by Plaintiff and the Tribe to  
8 government agencies such as the NICG identify Dorsey as attorney for the Tribe and  
9 Oegema as attorney for Luna Gaming. (DNOL Ex. J, p.311))

10 Plaintiff alleges that despite this lack of documentation evidencing an attorney-client  
11 relationship, Dorsey attorneys conducted themselves as Plaintiff's attorneys prior to and  
12 throughout efforts to implement the Project Agreements. Plaintiff alleges that Dorsey first  
13 initiated an attorney client relationship by contacting Celani regarding the gaming  
14 opportunity offered by the Tribe and making representations regarding this Project. After the  
15 Project Agreements were executed, Plaintiff alleges that Dorsey continued to act as Plaintiff's  
16 attorney by providing legal advice for Plaintiff's benefit on Project-related matters and non-  
17 Project related matters. Plaintiff further alleges that throughout the Project, Dorsey acted  
18 as counsel for Plaintiff by sending memoranda including legal advice jointly to Plaintiff and  
19 the Tribe and including Plaintiff in memoranda circulated to the Tribe marked "Privileged and  
20 Confidential" and "Attorney Work Product." According to Plaintiff, Plaintiff directed the work  
21 of Dorsey attorneys on the Project and paid for the legal fees generated by Dorsey attorneys  
22 pursuant to the Project Agreement.

23 Prior to entering into the Project Agreements, Plaintiff retained Akin Gump for what  
24 it calls a "second opinion" on the advisability of entering into the Project with the Tribe.  
25 (DOL Ex. Z, p.524-528) Throughout the Project, Plaintiff retained additional counsel for  
26 issues in connection with the Project such as California corporate law issues, public relations  
27 services, advice regarding slot machine licences, and interaction with the Bureau of Indian  
28 Affairs. (PUF 249) During the Project, Dorsey also continued to represent other entities

1 owned by Celani on Indian gaming issues. (PUF 254-271)

2  
3 C. Philip Baker-Shenk Leaves Dorsey

4 In or around June 2003, Philip Baker-Shenk informed his partners at Dorsey that he  
5 would be leaving to join a competing law firm, Holland & Knight. (PUMF 220) In that same  
6 month, Mark Jarboe, one of the Dorsey attorneys working on the Project, called for a private  
7 meeting with Celani and Oegema in Las Vegas. (PUMF 218-220) During this meeting, the  
8 attorneys discussed the strategy for obtaining a partner for Plaintiff to help bear the financial  
9 burden of Project costs. (UMF 220) Plaintiff and the Dorsey attorneys also discussed the fact  
10 that the Project was not moving forward under Baker-Shenk's leadership and planned to  
11 replace Baker-Shenk as lead attorney for the Project. (UMF 220; PNOL Ex. 6 Oegema  
12 Depo. 258, 261)

13 On September 15, 2003, Dorsey sent a letter addressed to Celani (rather than  
14 Plaintiff) notifying him that Baker-Shenk was leaving Dorsey and providing the following  
15 options: (1) "to be represented as to all matters by Philip Baker-Shenk and his new law firm  
16 of Holland & Knight"; (2) "to be represented as to all matters by the law firm of Dorsey &  
17 Whitney"; or (3) "to be represented by each firm as to certain matters." (PNOL Ex. 28 & 29)  
18 Celani chose the third option stating that he wishes to be represented by Baker-Shenk on the  
19 Project as well as other unrelated gaming projects. (Id.)

20 Baker-Shenk formally left Dorsey on September 17, 2003 and began his employment  
21 with Holland approximately one week later. (HUF 55) After joining Holland, Baker-Shenk  
22 resumed his work for the Tribe upon securing a written Conflict Waiver and Consent  
23 Agreement from Plaintiff in December of 2003. (HUF 62; PNOL Ex. 40) The cover letter to  
24 the conflict waiver explicitly stated that Baker-Shenk and Holland would represent the Tribe  
25 only as follows: Holland "will not undertake in the future any specific representation of Luna  
26 Entertainment in gaming project matters that are related to those now or to be undertaken  
27 by the Tribe." (PNOL Ex. 40) In this conflict waiver, Plaintiff consented to Holland's  
28 representation of the Tribe despite another Holland attorney's previous representation of

1 Plaintiff with regard to the Project. (Id.) Plaintiff also acknowledged that it has periodically  
 2 sought representation from Holland on matters unrelated to the Project in the past and could  
 3 reasonably expect representation in the future on matters "unrelated to the joint  
 4 development" between Plaintiff and the Tribe. (Id.)

### 5 **DISCUSSION**

6 Federal Rule of Civil Procedure 56 provides that a party may move for summary  
 7 judgment when there is no genuine issue as to a material fact and the moving party is  
 8 entitled to a judgment as a matter of law. A "genuine issue" is one where, based on the  
 9 evidence presented, a fair minded jury could return a verdict in favor of the nonmoving party  
 10 on the issue in question. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In  
 11 considering a motion for summary judgment, the Court must examine all of the evidence in  
 12 the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S.  
 13 654, 655 (1962).

14 Defendants Dorsey and Holland request summary judgment on Plaintiff's claims for  
 15 professional negligence and breach of fiduciary duty on the ground that Plaintiff cannot  
 16 establish the existence of an attorney-client relationship with Dorsey. Dorsey also requests  
 17 summary judgment on Plaintiff's claim for negligent misrepresentation on the grounds that  
 18 1) Plaintiff lacks standing to sue for misrepresentations made prior to its formation; 2) several  
 19 of the alleged statements are either true or unactionable statements of opinion; and 3)  
 20 Plaintiff's could not reasonably have relied on Defendants' representations when Defendants  
 21 were not acting as their attorney. In the alternative, Defendant Dorsey requests that all  
 22 Plaintiff's claims be limited in scope to complaints prior to September 2003 because no  
 23 breaches or misrepresentations are alleged after that time frame. Additionally, Defendant  
 24 Holland and Baker-Shenk contend that Plaintiff's claims against Baker-Shenk, and therefore,  
 25 Holland, are time-barred.<sup>3</sup>

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26  
 27 <sup>3</sup> Defendants Holland and Baker-Shenk also make an argument that Plaintiff  
 28 should be estopped from arguing that Dorsey was its attorney because (1) Plaintiff attested  
 to being in compliance with all Indian gaming laws and the alleged joint representation would  
 have been in violation of such laws; and (2) Plaintiff approved representations to third parties  
 that Dorsey was the Tribe's attorney. The Court concludes that Defendants cannot invoke

1

2 A. Dorsey Did Not Represent Plaintiff Prior to the Project Agreements

3 Because the relationship between Plaintiff and Dorsey changed dramatically once  
 4 Plaintiff entered into the Project Agreement with the Tribe, the Court will analyze separately  
 5 whether an attorney-client relationship existed prior to the Project Agreement and after the  
 6 Project Agreement. For the time period prior to the Project Agreements, the Court concludes  
 7 that Plaintiff has failed to raise a triable issue of fact on whether Dorsey represented it.<sup>4</sup>

8 An attorney-client relationship can only be formed through an express or implied  
 9 contract for representation. Fox v. Pollack, 181 Cal. App. 3d 954, 959 (1986). Where there  
 10 is no express contract, courts have focused on whether it “would have been reasonable,  
 11 taking into account all the relevant circumstances, for the person who attempted to invoke  
 12 the joint client exception to have inferred that she was in fact a “client” of the lawyer.” Sky  
 13 Valley Ltd. Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 651 (N.D. Cal. 1993) citing  
 14 Responsible Citizens v. Superior Court of Fresno County, 16 Cal. App. 4<sup>th</sup> 1717, 1733 (1993).

15 In most cases where there is a dispute about whether an attorney-client relationship  
 16 was formed there will be no express contract, so resolution of the dispute will turn on  
 17 whether a contractual relationship was formed implicitly. . . . While the subjective

18 equitable estoppel against Plaintiff because Defendants do not allege to have relied on these  
 19 misrepresentations without knowledge that they were false. See, e.g., Santa Maria v. Pacific  
 20 Bell, 202 F.3d 1170, 1176 (9<sup>th</sup> Cir. 2000) (equitable estoppel requires the injured party’s  
 21 actual and reasonable reliance on the representations of the party to be estopped.) The  
 22 Court also concludes that principles of judicial estoppel do not appear to apply in this case  
 because Defendants do not allege that Plaintiff took one position before a prior tribunal and  
 not seeks to gain an unfair advantage by changing that position. See Gagne v. Zodiac  
Maritime Agencies, Ltd., 247 F. Supp. 2d 1144, 1148 (S.D. Cal. 2003).

23 <sup>4</sup> Defendants argue that Luna Gaming lacks standing to sue for  
 24 misrepresentations made to Celani prior to its formation. The Court disagrees with  
 25 Defendant’s argument that Plaintiff lacks standing to sue for misrepresentations made to  
 26 Celani prior to its formation. Even though Defendant is correct that Celani and Luna Gaming  
 27 are legally separate entities, Plaintiff has standing to sue because it suffered injury as a result  
 28 of Defendant’s alleged misrepresentations. If Plaintiff’s allegations are true, Plaintiff was  
 wrongly induced to invest its money and resources in the Project as a result of Defendants’  
 misrepresentations to its one and only member, Celani. Lujan v. Defenders of Wildlife, 504  
 U.S. 555, 560-561 (1992)(standing where a Plaintiff suffers injury in fact as a result of the  
 Defendants’ actions and this injury can be redressed by the payment of damages.) Plaintiffs  
 have offered no support for the proposition that a corporate entity cannot sue for injury  
 suffered as a result of misrepresentations made to one of its members.

1 views of both the party and the lawyer may be relevant, they are not dispositive. In  
2 fact, subjective views that are deemed clearly unreasonable, after consideration of all  
the pertinent circumstances, become, as a matter of law, irrelevant.” Id.

3 Some of the relevant factors that courts may consider in determining the reasonableness of  
4 a party’s belief that an attorney-client relationship existed include: (1) whether the lawyer was  
5 paid for its services; (2) the magnitude of the interests involved; (3) whether the party had  
6 access to other lawyers; and (4) the relative sophistication of the party involved. Sky Valley,  
7 150 F.R.D. at 652.

8 Here, the Court finds that the undisputed facts establish that Celani did not have  
9 reasonable grounds to believe that Dorsey represented Celani or any gaming entity that  
10 Celani was contemplating forming in the time period prior to the execution of the Project  
11 Agreements. Celani alleges that he believed Townsend was acting as Celani’s attorney  
12 because (1) Townsend and Dorsey had previously represented Celani’s gaming entities; and  
13 (2) Townsend approached Celani and conveyed information regarding the possibility of a  
14 gaming venture with the Tribe. (PNOL Ex. 1, Celani Depo. 152-157) Celani’s subjective  
15 belief that Townsend represented him, however, is unreasonable in light of the circumstances  
16 leading up to the Project formation.

17 Celani admits that even though Celani had previously expressed an interest in  
18 California gaming opportunities, Townsend had not been engaged by him to scout out  
19 specific opportunities for Celani. (PNOL, Ex. 1 Celani Depo. 128-129) Celani also admits  
20 that he was aware that Townsend was acting as the attorney for the Tribe when Townsend  
21 first allegedly contacted him regarding the Project. (PNOL, Ex. 1 Celani Depo. 161) Celani,  
22 therefore, would not have reason to believe that Townsend purported to represent him when  
23 Townsend, presumably acting on behalf of the Tribe, called to “sell him” on the Tribe’s  
24 gaming opportunity. (PNOL, Ex. 1 Celani Depo. 160) In fact, Celani’s choice of words in  
25 describing Townsend’s conversation with him is telling – the only reasonable interpretation  
26 of Townsend’s communication is that Townsend was “selling” the Project on the Tribe’s  
27 behalf rather than advising Plaintiff on its own behalf.

28 In reaching this conclusion, the Court notes that Celani is a sophisticated business

1 man who owns several gaming entities represented by Dorsey as well as other law firms and  
 2 therefore is experienced with legal representation. (Celani Dec. ¶¶ 2, 3; PNOL Ex. 1 Celani  
 3 Depo. 102) Celani concedes that Townsend never represented that he (or Dorsey) would  
 4 represent Celani or any related entity with regard to the offered gaming opportunity. (PNOL,  
 5 Ex. 1 Celani Depo. 161) Knowing that Townsend already represented the Tribe, it would  
 6 be unreasonable for a sophisticated businessman experienced in legal representation to  
 7 assume that Townsend was also acting as his attorney without express assurances to that  
 8 effect.

9         Given Celani's knowledge that Townsend was acting as the Tribe's attorney, Dorsey's  
 10 past history of representing other Celani-owned entities and the fact that Townsend  
 11 approached Celani with the Tribe's offer, Celani's belief that Townsend was acting as his  
 12 attorney was not reasonable. Plaintiff offers no other support for a reasonable belief that an  
 13 attorney-client relationship existed such as evidence that Townsend and Dorsey billed Celani  
 14 for its advice regarding the gaming opportunity offered by the Tribe. In fact, Don Buch,  
 15 Celani's agent, demonstrated a belief that Dorsey *was not and could not be* Plaintiff's  
 16 attorney during this time frame because of its representation of the Tribe. (DNOL Ex. V, p.  
 17 488) Moreover, Plaintiff does not dispute that he obtained independent legal counsel from  
 18 Akin Gump regarding the viability of the Project rather than relying solely on Townsend's  
 19 representations (DNOL Ex. Z, pp.524-528) and also retained Dykema Gossett as separate  
 20 counsel to represent it during the negotiation and drafting of the Project Agreements. (Celani  
 21 Decl. ¶ 17)

22         For the reasons set forth above, Plaintiff has failed to raise an issue of fact as to  
 23 whether it reasonably believed that Dorsey was its attorney prior to the execution of the  
 24 Project Agreements. Because the Court concludes that no attorney-client relationship  
 25 existed between Dorsey and Plaintiff, the Court GRANTS partial summary judgment on  
 26 Plaintiff's claims for professional negligence and breach of fiduciary duty<sup>5</sup> to the extent that

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27  
 28         <sup>5</sup> Plaintiff appears to base its claim for breach of fiduciary duty on the existence  
 of an attorney-client relationship between it and Dorsey. (Plaintiff's Opp. at p.24) Although  
 Plaintiff is correct that attorneys can under certain circumstances owe an independent duty

1 they are based events prior to March 29, 2000 when the Project Agreements were executed.

2  
3 B. Dorsey's Representation of Plaintiff During the Course of the Project

4 As set forth above, the Court finds that Plaintiff has failed to raise an issue of fact on  
5 whether Dorsey represented it during the time period prior to the execution of the Project  
6 Agreements. Based on the evidence submitted, the Court finds that Plaintiff has raised an  
7 issue of fact as to whether Dorsey acted as its attorney after the execution of the Project  
8 Agreements.

9 As the Sky Valley court explained, the dispensing of legal advice is not sufficient to  
10 establish an attorney-client relationship in a joint representation context. 150 F.R.D. 648, 651.

11 In addition to the factors set forth above, where a joint representation is alleged, the Court  
12 must carefully consider the specific relationship between the two allegedly represented  
13 parties, analyzing factors such as: (1) the conduct of the parties toward one another; (2) the  
14 terms of any contractual relationship between the two parties; (3) whether and to what extent  
15 there was separate and private communication between the attorney and either of the  
16 allegedly represented parties; (4) the extent and character of common interests between the  
17 allegedly jointly represented parties; and (5) the extent to which either party communicated  
18 privately with other lawyers. Id. at 652-653.

19 In deciding this issue, the Court has taken into account the cooperative nature of the  
20 Project undertaking, the considerable common interests between the Tribe and the Plaintiff  
21 in the implementation of the Project, and the fact that the Project Agreements provided for  
22 joint decision-making by Plaintiff and the Tribe through the Business Board. The Court notes  
23 that such a cooperative undertaking would naturally entail the sharing of much legal and  
24 confidential information between Plaintiff and the Tribe's lawyers without necessarily creating  
25 an attorney-client relationship between them. However, after examining the evidence

26 \_\_\_\_\_  
27 of care to non-client third parties, it provides no support that Dorsey would owe a *fiduciary*  
28 duty to Plaintiff independent of an attorney-client relationship. Although Plaintiff appears to  
argue that a fiduciary duty can be created by virtue of a confidential relationship between the  
parties, the Court finds that Plaintiff has not offered evidence raising an issue of fact as to  
whether such a confidential relationship existed for the reasons set forth above.

1 submitted by Plaintiff, the Court finds that a reasonable trier of fact could conclude that  
2 Plaintiff reasonably believed that Dorsey represented Plaintiff and the Tribe jointly for the  
3 duration of the Project Agreements for the following reasons.

4 First, Dorsey attorneys circulated communications to both the Tribe *and Plaintiff*  
5 marked "CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED INFORMATION" (PNOL Ex.  
6 21 p. 475) Second, Plaintiff's evidence may establish that Dorsey provided legal advice  
7 specifically for Plaintiff's benefit and that such advice was not required by or envisioned in  
8 the Project Agreements. In addition to general strategy and legal update memos which  
9 would be encompassed by the joint decision making structure created by the Project  
10 Agreement, Dorsey appears to have advised Plaintiff on how to specifically implement its  
11 responsibilities related to the Project as follows: (1) Dorsey provided Plaintiff legal advice on  
12 how to comply with NIGC requirements regarding background checks (PNOL Ex. 20, pp.  
13 464-467); (2) Dorsey aided Plaintiff in obtaining licenses (Oegema Decl. ¶ 10); (3) Dorsey  
14 provided Plaintiff with advice on the legal intricacies and filing requirements involved with  
15 lobbying and making political contributions (PNOL Ex. 19. pp. 450, 452, 457, 459 and Ex.  
16 38); (4) Dorsey appears to have aided Plaintiff in finding potential financial partners for the  
17 Project (PNOL Ex. 22) and (5) Dorsey appears to have advised Plaintiff on its business plan  
18 (PNOL Ex. 18, p.434). Finally, Celani, the sole member of Plaintiff Luna Gaming, appears  
19 to have explicitly communicated an understanding that Plaintiff was represented by Dorsey  
20 with regard to the Tribe. (PNOL Ex. 28) Upon being informed that Philip Baker-Shenk was  
21 leaving Dorsey for Holland, Celani communicated to Dorsey that he wished Philip Baker-  
22 Shenk to continue to represent him with regard to the Project with the Tribe as well as other  
23 unrelated matters. (*Id.*)

24 Based on the evidence identified above, the Court concludes that a reasonable jury  
25 could find that Plaintiff and Dorsey did have an attorney-client relationship despite the formal  
26 documentation identifying Dorsey as the Tribe's attorney on the Project and the fact that  
27 Dorsey never billed Plaintiff for work done specifically for Plaintiff (as opposed to work done  
28 for the Tribe on the Project). First, the fact that Dorsey was documented as the Tribe's

1 official attorney does not rule out the possibility that it also acted as Plaintiff's *de facto*  
 2 attorney. Second, the billing records submitted by Plaintiff may support the conclusion that  
 3 Dorsey attorneys simply billed legal services provided to Plaintiff as work done for the Tribe  
 4 on the Project. Plaintiff submits evidence of billing entries for Dorsey advising Plaintiff on its  
 5 business plan and for numerous other private communications between Dorsey and Celani  
 6 or Oegema. (Pl. NOL Ex.18 p.434; NOL Ex. 23, p.563,582, 610, 611, 632, 675, 676) From  
 7 the evidence provided, a reasonable juror could conclude that this inaccurate billing practice  
 8 was the course of dealing ratified by the Plaintiff and Dorsey because Plaintiff was paying for  
 9 all the legal services provided by Dorsey to the Tribe in any case.

10 For the reasons set forth above, the Court concludes that Plaintiff has raised a triable  
 11 issue of fact regarding whether Dorsey and attorneys working for Dorsey had a joint  
 12 representation relationship with Plaintiff during the time period after the execution of the  
 13 Project Agreements. The Court therefore DENIES Defendants' motion for summary  
 14 judgment on Plaintiff's professional negligence and breach of fiduciary duty claims insofar  
 15 as these claims are based on events occurring after the execution of the Project Agreements.

16  
 17 C. Plaintiff's Claims for Professional Negligence and Breach of Fiduciary Duty Against  
 18 Baker-Shenk are Time-Barred

19 Defendants Baker-Shenk and Holland, the law firm that Baker-Shenk joined on  
 20 September 13, 2003, argue that Plaintiff's claims for professional negligence and breach of  
 21 fiduciary duty against them are time-barred. The Court agrees. Baker-Shenk and Holland  
 22 unequivocally ceased to represent Plaintiff as of December 2003. Any claims for injury  
 23 arising prior to that date are barred by the statute of limitations.

24 California Code of Civil Procedure Section 340.6 provides that:

25 An action against an attorney for a wrongful act or omission, other than for actual  
 26 fraud, arising in the performance of professional services shall be commenced within  
 27 one year after the plaintiff discovers, or through the use of reasonable diligence  
 should have discovered, the facts constituting the wrongful act or omission, or four  
 years from the date of the wrongful act or omission, whichever occurs first.

28 This time period is tolled if the "attorney continues to represent the plaintiff regarding the

specific subject matter in which the alleged wrongful act or omission occurred.” § 340.6(a)(2).

Because Plaintiff’s cause of action for breach of fiduciary duty also essentially complains of the failure of its attorneys in advising and representing it, this claim is similarly governed by a one year statute of limitations. Hydro-Mill Co., Inc. V. Hayward, Tilton and Rolapp Ins. Associates, Inc., 115 Cal. App. 4<sup>th</sup> 1145, 1153 (2004) (“To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the “gravamen” of the cause of action.... [T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.”)

Defendants Baker-Shenk and Holland argue that Plaintiff’s claims against them are time-barred because Plaintiff was aware of the fact that it suffered injury prior to July 2003 but did not bring its claims until December of 2006. Baker-Shenk and Holland point out that in July 2003, Plaintiff met with several Dorsey attorneys without Baker-Shenk and discussed the fact that the Project was not moving forward under Baker-Shenk’s leadership and that his attempts to obtain regulatory approvals met with continued failure. (PNOL. Ex. 6 Oegema Depo. 258, 261) Therefore, Plaintiff was aware of its alleged injuries at least as of July 2003 if not before. Plaintiff does not oppose the proposition that it was aware of injuries suffered prior to July 2003 but, instead, argues that the statute of limitations should be tolled because Defendants Baker-Shenk and Holland continued to represent Plaintiff past July 2003.<sup>6</sup>

Contrary to Plaintiff’s position, the continuing representation provisions of California Code of Civil Procedure section 340.6 do not apply because Baker-Shenk and Holland did

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<sup>6</sup> Although Plaintiff appears to argue Baker-Shenk and Holland continued to breach their fiduciary duty beyond the July 23, 2003 date, it does not submit any evidence of a breach newly discovered after that date. It appears from Plaintiff’s briefs that its claim for breach of fiduciary duty is based primarily on the alleged attorney-client relationship and the resulting dual representation of Plaintiff and the Tribe. Because Plaintiff provides no evidence of any independent ground upon which Baker-Shenk and Holland would continue to owe a fiduciary duty to Plaintiff after ceasing to represent it, the Court concludes that Plaintiff’s claim for breach of fiduciary duty is time-barred along with its claim for professional negligence.

1 not represent Plaintiff after December 2003. On October 16, 2003, Baker-Shenk, now an  
2 attorney at Holland, sent Plaintiff an enagement letter "in connection with general counsel  
3 advice on Federal policy/legislation/litigation." (Plaintiff's NOL Ex. 39) On December 1,  
4 2003, Baker-Shenk wrote Plaintiff a letter confirming Celani's understanding that the Tribe  
5 had retained Baker-Shenk and Holland to represent it in the Project. (Plaintiff's NOL Ex. 40)  
6 Because a Holland attorney had previously represented Plaintiff on the Project, Baker-  
7 Shenk requested a conflict waiver so that he may represent the Tribe with respect to the  
8 Project. (Id.)

9 Despite Plaintiff's argument to the contrary, the letter and attached conflict waiver  
10 evidence a clear understanding between the parties that Baker-Shenk and Holland would  
11 represent only the Tribe on matters related to the Project. First, Baker-Shenk specified in  
12 his cover letter that Holland "will not undertake in the future any specific representation of  
13 Luna Entertainment in gaming project matters that are related to those now or to be  
14 undertaken by the Tribe." (Id.) The body of the waiver makes clear that the source of the  
15 conflict to be waived was Holland's previous representation of Plaintiff rather than any  
16 continuing, joint representation of both the Tribe and Plaintiff with regard to the Project.  
17 (Id.) In fact, the conflict waiver clearly envisions Holland's future representation of Plaintiff  
18 only on matters *unrelated* to the joint development between the Plaintiff and the Tribe. (Id.)  
19 Plaintiff's interpretation that it was actually waiving the conflict stemming from continued joint  
20 representation of it and the Tribe by Baker-Shenk is, therefore, untenable.

21 Given the unequivocal communication from Baker-Shenk and Holland that they only  
22 represented the Tribe with regard to the Project, the Court finds that Plaintiffs could not  
23 reasonably have believed that these attorneys also represented the Plaintiff. The Court  
24 concludes that even if Baker-Shenk had represented Plaintiff while an attorney at Dorsey,  
25 he ceased to do so when he joined Holland and made clear to Plaintiff that he was not its  
26 attorney on or around December 1, 2003. The statute of limitations against Baker-Shenk  
27 and Dorsey, therefore, was tolled only to December 1, 2003 and expired a year later.  
28 Plaintiff's claims against Baker-Shenk and Dorsey for professional negligence and breach

1 of fiduciary duty are therefore time-barred because its complaint was not filed until  
 2 December 28, 2006. For the above reasons, the Court GRANTS summary judgment  
 3 against Plaintiff in favor of Defendants Baker-Shenk and Holland on the professional  
 4 negligence and breach of fiduciary duty causes of action.

5  
 6 D. Negligent Misrepresentation

7 Defendants also seek summary judgment on Plaintiff's claim for negligent  
 8 misrepresentation arguing, *inter alia*, that they cannot be liable to a non-client for negligent  
 9 misrepresentations. The Court concluded, as set forth above, that Plaintiff was not  
 10 represented by defendant attorneys prior to the Project Agreements and was not  
 11 represented by Baker-Shenk and Holland after December 1, 2003. The Court further  
 12 agrees with Defendants that Plaintiff could not have justifiably relied on *legal opinions* issued  
 13 by the attorneys of a potentially adverse party with whom they were negotiating an arms-  
 14 length contract. B.L.M. v. Sabo & Dietsch, 55 Cal. App. 4<sup>th</sup> 823, 838-39 (1997). The B.L.M.  
 15 case however distinguishes between legal opinions and factual allegations made by  
 16 attorneys to parties that they do not represent. See id. It appears to the Court that  
 17 Defendants' alleged misrepresentations to Plaintiff regarding the gaming project could  
 18 constitute a mixed bag of factual assertions, legal opinions and in some cases, even a  
 19 combination of both.<sup>7</sup> (Complaint ¶ 31, 83) On the present state of the record and legal  
 20 briefing, the Court cannot conclude that defendant attorneys did not make any factual  
 21 allegations, as opposed to legal opinions, to Plaintiff during the time periods when they were  
 22 not representing Plaintiff. The Court therefore DENIES summary judgment on the negligent  
 23 misrepresentation claim for statements made prior to the Project Agreement and statements  
 24 made after December 1, 2003 by Baker-Shenk and Holland.

25 Plaintiff further alleges that, even after inducing it to enter into the Project  
 26

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27 <sup>7</sup> Because the Court cannot determine upon the present state of the record  
 28 whether the alleged misrepresentations are factual assertions or legal opinions, it also  
 declines to address at this time whether certain of these alleged misrepresentations are, if  
 factual, true.

1 Agreements with the Tribe, defendant attorneys continued to make misrepresentations  
2 regarding the ease and speed with which Dorsey could obtain the needed regulatory  
3 approvals to implement the Project goals. (Complaint ¶ 82, 83) Despite Defendants'  
4 arguments to the contrary, where an attorney-client relationship exists, expressions of  
5 professional opinion can be actionable even if they are not factual statements. See Bily v.  
6 Arthur Young & Co., 3 Cal. 4<sup>th</sup> 370, 408 (1992) ("when a party possesses or holds itself out  
7 as possessing superior knowledge or special information or expertise regarding the subject  
8 matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge,  
9 information, or expertise, the defendant's representation may be treated as one of material  
10 fact.") The Court concludes that because Plaintiff has raised an issue of fact as to whether  
11 Dorsey jointly represented Plaintiff after the Project Agreements were executed, Plaintiff has  
12 also raised an issue of fact whether Dorsey purported to have superior knowledge of the  
13 subject matter and whether Plaintiff reasonably relied on this knowledge. For these reasons,  
14 the Court DENIES Defendants' motion for summary judgment on the alleged negligent  
15 misrepresentations made to Plaintiff.

16  
17 E. Liability for Events After September 2003

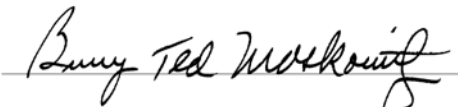
18 Defendants request that the Court grant partial summary judgment on all claims to  
19 the extent that they are based on events occurring after September 2003. Defendants point  
20 out that in September 2003, Plaintiff abandoned its original plan to build a casino on the  
21 SIHC owned land and started to pursue a joint venture with the Viejas tribe. Defendants  
22 base their request for partial summary judgment on the grounds that Plaintiff does not allege  
23 any acts of professional negligence, breach of fiduciary duty and misrepresentations after  
24 the date of September 2003. Upon review of the complaint, the Court disagrees. It appears  
25 that the complaint is broadly phrased to encompass continuing acts of professional  
26 negligence, breach of fiduciary duty and misrepresentations through the period after  
27 September 2003. The Court therefore DENIES Defendants' motion for partial summary  
28 judgment to limit Plaintiff's claims to events occurring prior to September 2003.

**CONCLUSION**

For the reasons set forth above, the Court GRANTS IN PART AND DENIES IN PART Defendant Dorsey's Motion for Summary Judgment [Doc. No. 26] and GRANTS IN PART AND DENIES IN PART Defendant Holland's and Baker-Shenk's Motion for Summary Judgment [Doc. No. 40]. The Clerk shall enter judgment for Dorsey against plaintiff on the first and third causes of action insofar as they allege acts of professional negligence and breach of fiduciary duty prior to March 29, 2000, when the Project Agreements were executed. The clerk shall enter judgment for Baker-Shenk and Holland & Knight against Plaintiff on the first and third causes of action in their entirety. The Defendants' motions for summary judgment as to the second cause of action and in all other respects except as specified above are DENIED without prejudice.

IT IS SO ORDERED.

DATED: September 30, 2008

  
Honorable Barry Ted Moskowitz  
United States District Judge